Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-727

LAWRENCE A. REGISTER
FRED C. HORNSBY and
RICHARD S. DIMARZO,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented For Review	2
Constitional Provisions Involved	2
Statement of The Case	3
The Evidence	4
Manner of Raising Federal Question	6
Argument For Reasons For Allowance of Writ	6
Conclusion	11
Appendix A	12
Appendix B	15
Appendix C	16

TABLE OF CASES

Agnello v. U. S., 269 U. S. 20	6
Aguilar v. Texas, 378 U. S. 108	7
Carroll v. U. S., 267 U. S. 132	7, 8, 9
Draper v. U. S., 358 U. S. 307	4, 10
Jones v. U. S., 357 U. S. 493	7, 9
Jones v. U. S., 362 U. S. 257	7

CASES — Continued

	Page
Ker v. California, 368 U. S. 974	6
Mapp v. Ohio, 367 U. S. 643	6
Spinelli v. U. S., 393 U. S. 410	2, 4, 8, 9, 10
U. S. v. Roth, 391 F.2d, 507	9
U. S. v. Ventresca, 380 U. S. 102	7

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LAWRENCE A. REGISTER, FRED C. HORNSBY, and RICHARD S. DIMARZO petition this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of Georgia entered in the case on the 15th day of June, 1971, and overruling a motion for a rehearing June 25th, 1971.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals affirming the judgment of the trial Court are reported in 183 S.E.2d, 68 and are appended hereto as Appendix A and Appendix B. Petition for certiorari to this judgment was applied for in the Supreme Court of Georgia and denied without opinion by the Supreme Court of

Georgia on September 8th, 1971, a copy of said judgment being hereto attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals of Georgia herein sought to be reviewed was dated and entered on June 15th, 1971. A motion for a rehearing was denied by the Court of Appeals of Georgia on June 25th, 1971. Petition for certiorari to the Supreme Court of Georgia was denied by that Court September 8th, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since a right, privilege and immunity is specially claimed under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

1. Whether a search of a vehicle and seizure of the contents by state officers without a search warrant and without an arrest warrant violate the Fourth and Fourteenth Amendment to the United States Constitution where the probable cause consists in the tip of a reliable informer whose identity is not disclosed and where the state officers conducting the search have not been informed of the underlying basis as to the informant's knowledge and whether the rule laid down in Spinelli v. United States U.S. are included in a search and seizure made without a warrant.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Four of the Constitution of the United States provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."

The Fourteenth Amendment to the United States Constitution provides in part:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioners were jointly indicted in Henry County, Georgia for the state offense of possessing marijuana and upon arraignment they each filed motions to suppress evidence (R. 5, 11 and 12), and said motions, after an evidentiary hearing, were overruled (R. 6 and 13). The overruling of this motion was certified by the trial judge in accordance with Georgia law for an immediate review the same as if it was from a final order or judgment and the petitioners filed their notice of appeal to the Court of Appeals of Georgia, the same having jurisdiction to review the question. (R. 1). The Georgia Court of Appeals rendered its judgment of affirmance and opinion (R. 169 and 176) and denied motion for a rehearing (R. 181). The Georgia Court of Appeals held that the information upon which the state officers acted in searching the vehicle and seizing its contents came from a reliable informer and that even though the informer did not testify and the basis for the informer's knowledge was not revealed to the of-

ficer conducting the search that, nevertheless, it was sufficient because the state officers "made the search and seizure upon a lawful arrest based upon the facts received from the informer to the effect that the defendant would be transporting marijuana in bulk." The State Court Distinguished the facts from Spinelli v. United States, 393 U.S. 410, as to the underlying circumstances involved in the information received by holding that the tip received was adequate. The Court of Draper v. United States, 358 U.S. 307 and held that the arresting officers had reason to believe the defendants were committing a crime and that the subsequent search and seizure was made incident to the arrest.

A motion for a rehearing pointed out to the Court that the warrantless arrest was not for an offense committed in the officers' presence and that the facts stated by the undisclosed informer to the officers was not learned by the officers until after the arrest, and search of the vehicle and that the officers did not have an exacting description or minute particulars prior to making the arrest. (R. 177) The Georgia Supreme Court denied certiorari (R. 184).

THE EVIDENCE

Petitioners were apprehended in Henry County on October 10th, 1970 (R. 19). Hornsby and Dimarzo were in a truck and Register was in an Oldsmobile (R. 19). They were searched prior to their arrest (R. 21 and 23). The agents unlocked the truck with a key furnished by one of petitioners and the agents could not see the contents of the truck prior to opening the door and

did not know of their own knowledge what the contents were, and could not ascertain either by sight or smell that the petitioners were violating any law in their presence (R. 23, 24, 27 and 54). The truck was searched and 64 bags of marijuana were seized (R. 31 and 19). The agents making the search and arrests had no warrant (R. 54). On October 9th, the day prior to the search and seizure, an agent participating in the investigation received information from a reliable informer that marijuana would be transported in a rental truck, (R. 69) ,and that it would arrive at the Fulton County Airport (R. 74) although the information did not disclose the name or description of the persons involved (R. 75). The informant was a federal officer (R. 85) and did not tell the state agent whether he knew these matters of his own personal knowledge or if it was learned from others (R. 73 and 74). The informant did not reveal the "underlying basis upon which he knew his information" or "where he got it from" and no one present made "inquiry to that fact" and the agent receiving the information did not know "whether or not the information was obtained through an illegal wire tap (R. 88), or whether the information was obtained from someone else and made no further inquiry as to the background or basis of his knowledge (R. 89). The only independent investigation made by the state officers to corroborate the information they had received "was the searching of this truck and finding this green leafy vegetation" (R. 105).

MANNER OF RAISING FEDERAL QUESTION

Petitioners filed, prior to trial, motions to suppress evidence (R. 5, 11 and 12) and these motions were overruled by the trial court (R. 6 and 13). Notice of appeal was filed complaining of the overruling of said motions (R. 1) and same was enumerated as error in the Georgia Court of Appeals (R. 166). Motion for a rehearing was applied for on the same ground, (R. 177) and certiorari to the Georgia Supreme Court was applied for to review the judgment of the Court of Appeals on this question (R. 182).

ARGUMENT FOR REASONS FOR ALLOWANCE OF WRIT

Where a search is conducted in an illegal and unconstitutional manner violative of the provisions of the Fourth Amendment, by state officers, the exclusionary rule is enforceable against the States through the Due Process Clause of the Fourteenth.

Mapp v. Ohio, 367 U.S. 643, (81 S. Ct. 1684)

Ker v. California, 368 U.S. 974, (82 S.Ct. 480.)

While a search of a dwelling is not authorized without a proper search warrant when the officers have ample time to procure one.

Agnello v. United States, 269 U.S. 20, (46 S.Ct. 4,)

Jones v. United States, 357 U.S. 493, (78 S.Ct. 1253,)

a search of a movable vehicle is an exception where there is sufficient probable cause present.

Carroll v. United States, 267 U.S. 132, (45 S.Ct. 280,)

In

Jones v. United States, 362 U.S. 257, (80 S.Ct. 725,)

the Supreme Court "indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." See: United States v. Ventresca, 380 U.S. 102, (85 S.Ct. 741).

Hearsay may be the basis for the issuance of a search warrant.

Jones v. United States, 362 U.S. 257, (80 S.Ct. 725,).

However, where the hearsay tip of a reliable informer is relied upon "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was credible or his information reliable."

Aguilar v. Texas, 378 U.S. 108, (84 S.Ct. 1509.)

The second part of Aguilar is not at issue in this case, for the officer detailed the fact that his informant had proved reliable in the past and had furnished other information upon which arrests were made. However, as to the first part of Aguilar the evidence for the State completely fails to establish how and in what manner the informer knew of the facts he was passing on to the agent. The agents did not inquire as to the source of the informant's tip. Was it learned from first-hand knowledge? Was it an underworld rumor? Was it obtained illegally by federal agents by an illegal wiretap, and so they could not afford to have their identities established? Did the informant learn the information through one who was himself unreliable? These and many other theories were just as reasonable to suppose, and thus the law requires some of the underlying basis to be established before crediting hearsay as a proper basis of probable cause.

In

Spinelli v. United States, 393 U.S. 410, (89 S.Ct. 584),

Aguilar's test was not met because:

> "The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation."

This was necessary so that the court may know that the officer making the search "is relying on something

more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli, supra.*

Also see:

United States v. Roth, 391 F. 2d 507,

for a similar holding.

The only distinction between the case at bar and the holding in *Aguilar, Spinelli, Ross and Jones* is that those cases involved the sufficiency of hearsay affidavits to support the issuance of a search warrant, whereas here the question is whether the hearsay imparted to the agents upon which they relied in making their warrantless search was required to meet the same rule.

Footnote #5 in *Spinelli* indicates that the Supreme Court in fact considered probable cause for an arrest or a search without a warrant to be

> "basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

The Supreme Court then went on to lay down the rule as follows:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in suf-

> ficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

The State can derive no comfort from

> *Draper v. United States*, 358 U.S. 307, (79 S.Ct. 329,)

wherein a warrantless search and seizure based on a warrantless arrest was upheld by the Supreme Court, because there the

> "informer went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival,"

Spinelli vs. United States, supra, and the informer reported to the officer conducting the search that Draper had gone to Chicago the day before by train and that he would return to Denver by train with a specified amount of heroin. *Draper* demonstrates a situation of information with such minute detail as to illustrate the underlying basis of the informant's knowledge as to reliability and trustworthiness. The generality of the information in the case at bar would have indicated to the recipient of the information that it was gathered as mere rumor or supposition.

CONCLUSION

The motions to suppress should have been sustained and the judgment overruling them should have been reversed.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioners

APPENDIX A

46236. REGISTER, et al. v. THE STATE. Ev-52

EVANS, Judge. The defendants were jointly indicted in Henry Superior Court for the offense of possessing marijuana. Upon arraignment, motions to suppress the evidence were filed, and after a hearing, same were overruled. The trial judge certified same for immediate review. The appeal is from the denial of the motions to suppress.

The evidence shows that certain police officers had received information that a quantity of marijuana would be shipped into the Fulton County Airport on a named date, transported in this vicinity by 3 or 4 persons in a van-type rental truck accompanied by a 1970 yellow and black Oldsmobile automobile — "442"; and that "Larry would be driving it." This information came from a reliable informant, who was another police officer and whose name was not disclosed in order that he might remain unknown, and with whom the officer who testified had previously dealt in such fashion as to suggest the reliability of said informant. After surveillance, a truck and auto similar to the ones above described were followed from the Fulton County Airport for a distance of 8 miles, and stopped in Henry County, where a search was made of the rental van-type truck. The search disclosed a leafy vegetation which, upon subsequent examination by the State Crime Laboratory, was described as marijuana. *Held:*

The sole question for determination here is whether a vehicle can be lawfully searched and its contents

seized pursuant to the 4th and 14th Amendments to the Constitution of the United States, where the warrant and search are predicated upon information from a reliable informer who does not testify, and where the basis for the informant's knowledge is not revealed by him, and is unknown by the officers conducting the search.

Where a search is conducted without a valid warrant it violates the provisions of the 4th and 14th Amendments to the Constitution of the United States and the search and seizure is illegal. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, ____ L. Ed. ____; Kerr v. California, 368 U.S. 974, 82 S. Ct 480, ____ L. Ed. ____. But, although a search of a dwelling is not authorized without a proper search warrant, when the officers have ample time to procure one (Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4, ____ L. Ed. ____; Jones v. United States, 357 U.S. 493, 78 S. Ct. 1253, ____ L. Ed. ____) a search of a movable vehicle is an exception, provided there is sufficient probable cause for such search. See Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, ____ L. Ed. ____. But where the hearsay tip of a reliable informer is relied upon, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was creditable or his information reliable. Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, ____ L. Ed. ____; Giordenello v. United States, 357 U.S. 480, ____ S. Ct. ____, ____ L. Ed. ____. But

the State officers here made the search and seizure upon a lawful arrest based upon the facts received from the informer to the effect that the defendants would be transporting marijuana in bulk. This case differs from Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, ____ L. Ed. ____; United States v. Roth, 391 F. 2d 507; and Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, ____ L. Ed. ____, as to the underlying circumstances involved in the information received about the alleged criminal act which is thereafter corroborated. It cannot be said that the tip received was inadequate here. If the information received does not sufficiently state the underlying circumstances from which the informant had concluded the defendants were violating the law, or does not sufficiently detail his activities, but is relying on mere casual rumor or general reputation, a warrant, search or seizure based thereon would be illegal. The facts here are very similar to those of Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, ____ L. Ed. ____, where an experienced Federal Narcotics Agent was told by an informer, whose information they had always found to be accurate and reliable, that a certain person was peddling narcotics; had gone to Chicago to obtain a supply of same; and would return on a certain train, and on a certain day or the day after. The agent met the train, easily recognized the peddler from the description previously furnished by the informant, and without a warrant he arrested the peddler, searched him and seized the narcotics. The Draper case holds that the arrest, search and seizure, were authorized and lawful.

In the case sub judice it is true the information was

hearsay since obviously the undercover officer, whose identity was protected, must have received the information from another source, unless he was an accomplice or co-conspirator. The arresting officers had reason to believe the defendants were committing a crime under this factual situation, and the arrest was lawful. The subsequent search and seizure, which disclosed the leafy vegetation, was made incident to the arrest, and was likewise valid. The details provided by the informant (quantity of contraband, type of travel, number of men, one of whom was named Larry, etc., here, as in the Draper case), was with minute particularity, that is, sufficiently specific and subsequently corroborated, and the Draper case is controlling on this court. See also in this connection United States v. Acosta, 411 F. 2d. 627, and United States v. Malo, 417 F. 2d 742. The judgment of the lower court is

Affirmed. Jordan, P.J., and Quillian, J. concur.

APPENDIX B

ATLANTA, June 15, 1971

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

L. A. Register et al v. The State

This case came before this court on appeal from the Superior Court of Henry County; and, after argument

had, it is considered and adjudged that the judgment of the court below be affirmed.

Jordan, P. J., Quillian and Evans, JJ., concur.
BILL OF COSTS, $30.00

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA, September 8, 1971

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Lawrence A. Register et al. v. The State.

Upon consderation of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

BILL OF COSTS, $100.00.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA
SEP. 29, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Wesley R. Asinof paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(Signed) JOLINE B. WILLIAMS,
Clerk.

Case No. 46236
Court of Appeals of Georgia

Remittitur from Supreme Court.

Filed in office OCT. 1, 1971

(Signed) MORGAN THOMAS,
Clerk Court of Appeals of Georgia.